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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

GREGORY HARPER, Plaintiff and Appellant, v. KENNETH HARPER, as Trustee, etc., Defendant and Respondent.	C081167 (Super. Ct. No. PP20130031)

Rosa Harper established a revocable trust for which her sons Gregory Harper, Kenneth Harper, and Nicolas Harper were successor beneficiaries.[1] From trust inception, Kenneth has served as trustee. During Rosa's lifetime, Kenneth managed the trust assets to pay for Rosa's care. When Rosa died, Kenneth began winding up the trust and distributing trust assets to Gregory, Nicolas, and himself. Gregory demanded an

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[1] For the sake of clarity, we refer to members of the Harper family by their given names.

accounting of trust assets and accused Kenneth of mismanaging the trust assets. Unsatisfied with the response he received from Kenneth, Gregory filed a petition for removal of Kenneth as trustee, noncompliance with the prudent investor rule, an accounting, and disgorgement of attorney fees.

Originally set for 3 days, trial stretched to 17 days over the course of more than a year. Trial culminated with the trial court's issuance of a 45-page statement of decision that denied Gregory's petition in its entirety. The trial court subsequently awarded Kenneth $85,452 in attorney fees and $8,104 in costs.

On appeal, Gregory contends (1) he never received a proper accounting under Probate Code section 16063,[2] (2) the trial court abused its discretion in admitting into evidence documents introduced by Kenneth after Gregory rested his case, (3) the trial court erroneously disallowed his attorney from challenging the authenticity of documents introduced by Kenneth after Gregory rested his case, and (4) the trial judge was biased because he and Kenneth belonged to the same gun club.

We conclude Gregory has not presented the argument regarding the claimed insufficiencies of the accountings in a manner that allows for proper appellate review. The trial court did not abuse its discretion in allowing Kenneth to introduce documentary evidence for purposes of rebuttal to issues raised by Gregory during his case-in-chief. And the record does not support Gregory's assertion that he was denied the right to challenge the authenticity of documentary evidence introduced on rebuttal by Kenneth. Finally, a challenge to a trial judge for bias cannot be raised on direct appeal.

Accordingly, we affirm.

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[2] Undesignated statutory citations refer to the Probate Code.

FACTUAL AND PROCEDURAL HISTORY

Consistent with the applicable standards of review on appeal, we recount the facts in the record in the light most favorable to the judgment. (*Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1340.)

Rosa's Trust

Gregory is a practicing California attorney. In March 1995, he prepared the trust document for Rosa. During Rosa's lifetime, the trust was revocable. Upon Rosa's death in March 2010, the trust became irrevocable. Kenneth has served as trustee since the trust's inception. There is no dispute that the trust is valid and no dispute Kenneth managed the trust to pay all of Rosa's bills and costs of care. After Rosa died, Kenneth began distributing the remainder of the trust's assets to the three beneficiaries. Since Rosa's death, Gregory has sought what he considers to be a proper accounting.

In March 2010, Gregory demanded "a very broad range of documents pertaining to Rosa Harper's affairs." In early April 2010, Jackson Mason, Jr., was serving as legal counsel to Kenneth. Around that time Mason received an angry telephone call from Gregory. Gregory wanted an accounting for the trust. Mason hoped to save the cost of a full accounting by seeking to provide information that would answer Gregory's questions about the trust. Mason asked Kenneth for all of the bank and investment account statements. In response, Kenneth provided Mason with "two thick binders full of statements." Mason's assistant made photocopies of all the documents and the documents were mailed to Gregory. Also in April 2010, Mason communicated to Gregory that there would be a distribution of trust assets totaling $150,000 that would yield a $50,000 distribution to each of the beneficiaries.

In early May 2010, Gregory sent a fax to Mason indicating he had not received the $50,000. Mason responded that he had sent the check. Mason also inquired about whether Gregory was still insisting on a formal accounting or whether the submitted

account statements would suffice. Later that month, Gregory responded by letter that he had received the $50,000 check. He also stated, "I expect an accounting." Mason and Kenneth decided to "get to work on that accounting right away." To this end, Mason and Kenneth turned over documents to Kathy Schulte.

The evidence at trial established that Schulte has been a paralegal since 2002, a notary public since 2008, and has served as a certified professional private fiduciary since 2009. Her experience includes working as a trustee for a trust, health care agent under an advance health care directive, attorney-in-fact under a durable power of attorney, and has had 10 active fiduciary positions as a professional private fiduciary at the time of trial. Schulte has prepared approximately 150 fiduciary income tax returns and between 100 to 130 accountings for court approval. Schulte has prepared approximately 60 fiduciary income tax returns.

The trial court found Schulte "is widely used by estate and trust attorneys in El Dorado, Placer and Sacramento Counties." The trial court further found "Schulte's education, training, and experience [more] than sufficient to qualify her to prepare the accountings and tax returns in this case." Schulte reviewed all of the trust-related documents in the binders given to her by Kenneth. The trial court determined Kenneth "and Schulte testified credibly regarding payment of expenses and [reimbursement]s claimed."

In June 2010, Mason distributed $70,000 to each of the trust beneficiaries, including Gregory. A month later, the first accounting was sent to Gregory. The accounting is 185 pages long and itemizes trust events for 5 years. At the same time, Mason informed Gregory that another $1,200 would be distributed to him, $1,200 to Kenneth, and a 1996 Oldsmobile to Nicholas.

In September 2012, Schulte prepared a second trust accounting for the period from July 2010 through July 2012. At that point, the trust assets remaining amounted to

$30,261.27. Because Mason had not heard from Gregory's attorney, Jacqueline Coulter-Peebles, for approximately a year and had not received the list of requested documents from her, he assumed Gregory was no longer represented by Coulter-Peebles. Thus, Mason sent the second accounting directly to Gregory.

Coulter-Peebles responded to the second accounting by stating both accountings were missing numerous bank statements. She requested additional documents as well. Mason ultimately sent the personal income tax returns for Rosa for the years from 2005 through 2009 and documents relating to her life insurance. Mason also ended up sending Rosa's ashes to Coulter-Peebles' office.

Gregory's Petition for Removal of Kenneth as Trustee

In February 2013, Gregory filed a petition for removal of Kenneth as trustee of Rosa's trust. In the petition, Gregory also requested a forensic accounting, that remaining trust assets be turned over to him, and attorney fees. The matter proceeded to trial on the claims that Kenneth had breached his fiduciary duties as trustee, violated the "prudent investor rule,"[3] and was required to reimburse the trust for losses sustained during the stock market decline around 2009. The trial court noted that, "although not stated in the Petition as a cause of action, [Gregory] raised during trial, a claim that [Kenneth] breached his fiduciary obligations to the beneficiaries by failing to comply with . . . sections 16060 and 16061."

At trial, Gregory introduced the testimony of certified public accountant Keith Stoneking. Stoneking testified that a proper accounting must be made by using

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[3] The Uniform Prudent Investor Act (§ 16045 et seq.) generally requires a trustee to "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." (§ 16047, subd. (a).)

the source documents. Stoneking opined that Kenneth as trustee should not have hired Schulte to prepare the trust accountings and tax returns because she is not a certified public accountant. In Stoneking's view, Schulte was not competent to prepare these documents for the trust. The trial court found Stoneking's testimony unpersuasive and determined "that Stoneking is not an expert qualified to proffer opinions about Probate accountings – the essential subject of this case." The trial court further found that "Stoneking admitted on cross-examination that the 'reports' here (the First and Second Accountings) are 'accountings' under the 'generally accepted accounting principles,' although he insists on calling them mere 'compilations' because only a CPA can express an opinion as to whether they constitute accountings and Schulte is not a CPA."

Gregory also introduced the testimony of Lee Anke, a registered investment advisor. Anke testified that the substantial losses sustained by the trust during the market downturn in 2007 through 2009 could have been avoided with a different investment approach. Anke opined that Kenneth failed to diversify the trust's investments, monitor the performance of the investments, and respond to changes in market conditions. Anke described a "Prudent Investor Network" model approach to investment allocation that he stated would have increased the investment performance.

The trial court found Anke's testimony unpersuasive, noting the model advanced by Anke was not used by investment advisors but was developed specifically for the present litigation. Thus, Anke benefited from the clarity of hindsight when it was not clear that "any investment advisor – including [Anke] – would have made those specific investments in 2007, 2008, or 2009."

The trial court found Kenneth sold Rosa's residence at "what appears to be an above market price for the home" and then promptly invested the proceeds with Edward Jones, a brokerage/investment house. Kenneth chose Michael Steinbach at Edward Jones

as the trust's investment advisor. Steinbach is a financial planner with a securities license. Kenneth and Steinbach discussed diversifying the trust's investment portfolio and decided on a conservative approach. One of their goals was to ensure Rosa would not outlive the money in her trust account. Kenneth and Steinbach met approximately every 6 to 12 months.

Due to a downturn in the securities market, the trust portfolio suffered a decline in value around 2009 and 2010. Steinbach observed that markets tend to correct over time and the best course would be to stay the course in high-quality investments. Steinbach noted that Rosa died around the bottom of the downturn and the market thereafter increased 178 percent. Thus, it appeared the market did correct as Steinbach had predicted to Kenneth during the downturn.

The trial court found Kenneth "established reasonable and appropriate investment objectives for the trust corpus and monitored its performance in accord with those objectives. Indeed between roughly 2005 and 2007 the portfolio generated income. The fact that the portfolio suffered losses by 2009 does not change the Court's conclusion. The downturn in the US economy, including 'Wall Street,' was the largest decline since the Great Depression. There can be little dispute that this downturn reduced the value of stocks, bonds and mutual funds across-the-board. The Harper Trust was no different." (Record citations omitted.) The trial court further found Kenneth prudently utilized the services of an investment advisor and engaged in a "buy and hold" strategy to portfolio management.

Regarding Gregory's claim that Kenneth failed to provide required information about the trust's finances, the trial court credited Kenneth and Mason's testimony that "they responded to the demand by providing documents, explanations and, where appropriate, promptly mailed out distributions of the trust corpus. Further, to the extent [Gregory] claims the responses were inadequate because 'source documents' were

allegedly not provided, the Court has already ruled and reject[ed] that argument. In short, the Court ruled that [Gregory] had not made a request for 'source documents' and that demanding every piece of paper related to the trust was unreasonable and overbroad." (Record citations omitted.)

The trial court denied Gregory's petition in its entirety.

DISCUSSION

I

Sufficiency of the Accounting

Gregory contends that "[w]hat was produced by [Kenneth, as trustee] was not a valid accounting and had inadequate supporting documentation." Rather than elucidate on this claim, Gregory cites a span of 202 pages of his own testimony.[4] With this singular citation, Gregory asserts that "a quick perusal of the two requests made by [him] are both reasonable and clear." We reject the assertion.

As this court has previously explained, "In every appeal, 'the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon* [(1971)] 3 Cal.3d [875,] 881.) Further, the burden to provide a fair summary of the evidence "grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.)' " (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739, quoting *Boeken v. Philip Morris Inc*. (2005) 127 Cal.App.4th 1640, 1658.)

Moreover, "[t]o demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn.

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[4] We presume Gregory intends to refer to the reporter's transcript because the span of pages he cites do not exist in the clerk's transcript.

16; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' (*Atchley v. City of Fresno* [(1984)] 151 Cal.App.3d [635,] 647; accord, *Berger v. Godden* [(1985)] 163 Cal.App.3d [1113,] 1117 ['failure of appellant to advance any pertinent or intelligible legal argument . . . constitute[s] an abandonment of the [claim of error'].)" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Under these principles of appellate review, Gregory has not met his burden either to fairly summarize the evidence in a light most favorable to the judgment or to support his argument.

First, the opening brief's statement of facts draws almost exclusively from Gregory's testimony. This limited recitation of the facts fails to acknowledge the trial court's detailed, 45-page analysis and rejection of his claims.[5] This omission means Gregory does not discuss the trial court's express finding that Kenneth and Mason responded to the demands by providing documents and explanations. Moreover, the opening brief does not acknowledge the trial court found Gregory never requested the source documents relating to the accountings. In short, the recitation of facts in the opening brief does not provide a fair representation of the evidence introduced at trial or the trial court's findings regarding the evidence.

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[5] The opening brief does cite "CT 1665-70" in referring to the trial court's "written decision." The opening brief often mixes citations to the clerk's transcript and the reporter's transcript. Pages 1665 through 1670 of the clerk's transcript contain part of the minutes of trial. These pages in the clerk's transcript do not contain, or even indicate, the trial court's reasoning regarding Gregory's claims. Pages 1665 through 1670 of the reporter's transcript pertain only to Gregory's testimony.

Second, the opening brief does not develop the argument regarding section 16063. Instead, the opening brief simply concludes that "what was produced by [Kenneth] was not a valid accounting and had inadequate supporting documentation." Gregory does not identify whether his challenge is to the first and/or the second accountings prepared by Kenneth. The difficulty in identifying the object of Gregory's challenge is the lack of citation to either accounting. Instead, Gregory appears to cite only to his own testimony and that of Mason.[6] The opening brief appears to assume that the statutory inadequacy of accounting is self-evident based on a wide-ranging span of witnesses' testimony.

In short, we cannot discern whether Gregory's challenge involves the first and/or the second accounting. The argument also does not explain how the accountings fail to meet the statutory requirements of the cited statute, i.e., section 16063. Accordingly, we deem the argument forfeited for lack of development. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408.)

II

Admission of Documentary Evidence after Gregory's Case-in-chief

Gregory complains of " 'Sandbagging' as [Kenneth's attorney] made a verbal motion to proffer previously undisclosed documents after approximately eleven (11) days of Trial immediately after [Gregory] had concluded his case-in-chief." Gregory further argues that "[t]here was no justifiable extenuating circumstances offered to support the

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[6] The opening brief cites "CT 1667-1869." The clerk's transcript, however, ends on page 1696. Pages 1667 through 1869 of the reporter's transcript comprise more than 200 pages of Gregory and Mason's testimony on a number of issues – many of which do not relate to the sufficiency of the accounting itself. These include spreading Rosa's ashes, choice of investment advisor, distribution of fund assets, and preparation of trust tax returns.

late proffer of documents." And Gregory asserts he was denied the opportunity to challenge the authenticity of the documents introduced by Kenneth. We are not persuaded.

A.

The Trial Court's Admission of Documentary Evidence Introduced by Mason

During his case-in-chief, Gregory called Schulte as a witness. Schulte was asked numerous questions about the kinds of documents she relied upon to prepare the trust accounting and tax returns. These questions were elicited to prove Schulte did not competently prepare documents for the trust.

On rebuttal, Kenneth's attorney, Mason, took the witness stand. Mason testified that Schulte personally reviewed all of the bills and receipts given to her. Mason also introduced into evidence the bills and receipts Schulte reviewed. Gregory's attorney would later object that the bills and receipts should be excluded based on unfair surprise and lack of authenticity. The trial court overruled the objections and explained as follows:

"Number one, they're relevant, because what is at issue here is – one of the issues in this case is [Schulte's] skill and ability to prepare tax returns, you know, is she qualified. . . . [¶] And, therefore, there was the argument that she's just unqualified, whether it be as a bookkeeper or tax preparer, preparing returns, and she doesn't have any of the source documents in front of her. [¶] . . . So when I look at these documents, and based upon my notes, it looks like these were offered not for the truth of the matter asserted therein, which would be dealing with the hearsay, that is, that she indeed had $56.97 in interest income from B of A, but rather it was being proferred to show that this was a document, regardless of where it came from, that she relied on."

The trial court found that "with respect to the authenticity of the documents, authenticity can be established by a variety [of] things, including such circumstantial evidence as the logos on the documents, the official writings on the document."

Regarding unfairness, the trial court stated: "And then lastly, to the extent that there is the argument that this is somehow some form of unfair surprise, I note a couple of things on that. First of all, this case has gone on for over a year, and [Coulter-Peebles] or [Gregory] had substantial opportunities to examine and cross-examine the individuals. I think [Coulter-Peebles] had [Schulte] on the stand for a day and a half. Maybe two days I think she was on the stand, both direct and – both as a witness called by [Gregory], I think, then as a witness called by [Kenneth]. So, they had her on the stand. [¶] And I note that there was plenty of opportunity for [Gregory] to have conducted any depositions they needed to conduct with regard to these documents, if they felt that it was necessary to do so, including, I suppose, deposing the custodian of records at Bank of America to challenge the authenticity of this."

B.

Rebuttal Evidence

In arguing the trial court erred in admitting the documentary evidence upon which Schulte relied in preparing trust documents, Gregory skips the trial court's finding that the evidence was admissible on rebuttal. "The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion." (*People v. Harris* (2005) 37 Cal.4th 310, 335.) " ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

The record supports the trial court's finding that the documentary evidence was admissible to allow Kenneth to rebut the claim that Schulte had been incompetent in preparing the trust accountings and tax returns. Gregory's theory of the case included the assertion that Schulte had "to have the original source documents, not a spreadsheet that's created by the trustee that doesn't show receipts, invoices or anything that is connected with the figures and information that you put down on a spreadsheet." Because Gregory asserted Schulte had been misled by the summaries supplied by Kenneth, the documents and testimony introduced by Mason was highly probative as rebuttal evidence. As Mason explained, Schulte received and personally reviewed the many source documents that supported her preparation of the first and second accountings. The trial court did not abuse its discretion in determining this rebuttal evidence to be admissible.

C.

Lack of Extenuating Circumstances

We also reject Gregory's contention that no extenuating circumstances existed for the admission of the "late proffer of documents" introduced by Mason on rebuttal. Underlying Gregory's contention is the assertion Kenneth misrepresented the scope of documents when he made his pretrial disclosure of documents. In support of this assertion, Gregory offers us no citation to the record where Kenneth made his representation or how the pretrial evidence differed from that introduced by Mason. Our review of the record, however, reveals the trial court expressly rejected this contention. Specifically, the trial court found "insufficient evidence to conclude [Kenneth] has acted in bad faith in not disclosing the documents (since [Gregory] never made a specific request for the 'source documents' at issue here) . . . ." In the absence of record citations, Gregory has not met his burden to demonstrate error by the trial court.

D.

Inability to Challenge Authenticity

Gregory argues he was prevented from challenging the authenticity of the documentary evidence introduced by Mason on rebuttal. We disagree.

Citing to pages 1797 to 1834 of the reporter's transcript, Gregory asserts these pages show "the [Trial] Court denying [Gregory's] counsel the opportunity to cross examine [Kenneth's] counsel on his odd attempt to authenticate documents he did not create or have a legitimate basis to authenticate . . . ." We have examined the cited pages that reveal Gregory's attorney lodged numerous objections – including objections on grounds of hearsay, relevance, narrative testimony, vagueness, speculation, and argument. During this span of testimony, Mason gave a detailed description of numerous exhibits relating to the trust. However, Gregory's counsel did *not* object on grounds of authenticity of the documentary evidence introduced by Mason.

When asked by the trial court whether Gregory's attorney had any cross-examination, she responded: "Oh, I certainly do, Your Honor." Gregory's attorney then engaged in cross-examination of Mason that spans 34 pages of the reporter's transcript but did not address the authenticity of the documents. Thus, Gregory's counsel had ample opportunity but did not make a timely objection on grounds of authenticity.[7]

A timely objection, however, was necessary to preserve this claim for appellate review. " ' "In order to preserve an issue for appeal, a party ordinarily must raise the

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[7] Although Gregory does not cite it, we note the record contains a motion filed by Gregory to exclude this documentary evidence. The motion was filed on October 20, 2014 – approximately a month before Mason took the stand to testify and introduce this source document evidence. However, none of the grounds for the motion was an objection to the source documents' authenticity.

objection in the trial court." [Citation.] "The party also must cite to the record showing exactly where the objection was made." [Citation.] As the California Supreme Court . . . reaffirmed, "a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*)' " (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1065.) For this reason, "[t]he general rule is that 'evidence which is admitted in the trial court without objection, although incompetent, should be considered in support of that court's action [citations] and objection may not be first raised at the appellate level.' " (*Oiye v. Fox*, *supra*, at p. 1066, quoting *In re Fraysher's Estate* (1956) 47 Cal.2d 131, 135, 301.)

Here, Gregory has not met his burden to demonstrate with a citation to the record showing exactly where he preserved the issue with a timely objection. To the contrary, our review indicates his attorney had ample opportunity to lodge an authenticity objection when Mason was testifying, but did not take advantage of that opportunity. Consequently, the claim has not been preserved for appellate review.

III

Allegation of Judicial Bias

Gregory alleges judicial bias on grounds the trial judge and Kenneth were both members of the same gun club. This issue is not cognizable on appeal.

Code of Civil Procedure section 170.3, subdivision (d), provides in pertinent part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification." (See *People v. Brown* (1993) 6 Cal.4th

322, 333, 334.) "[A]s the Supreme Court observed, subdivision (d) 'has the dual purpose of promoting "judicial economy" and "fundamental fairness," ' both of which are fostered by the timely seeking of a writ of mandate. [Citation.]" (*People v. Barrera* (1999) 70 Cal.App.4th 541, 550.) The purpose behind subdivision (d) is to secure " ' "speedy review of a disqualification ruling, since permitting that ruling to be attacked later on appeal of the judgment could invalidate every ruling made by the trial court judge after the disqualification motion was denied." ' " (*People v. Brown*, *supra*, at p. 333, fn. 8.) Accordingly, Gregory's claim regarding judicial bias is not cognizable in this direct appeal.

DISPOSITION

The judgment is affirmed. Kenneth Harper shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
MAURO, J.